**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2014 MSPB 7**

Docket No. SF-315H-12-0284-I-1

**Mimosa P. Calixto,**

**Appellant,**

**v.**

**Department of Defense,**

**Agency.**

January 29, 2014

Mimosa P. Calixto, Corona, California, pro se.

Rachael K. House, Esquire, Carson, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

## OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her appeal for lack of jurisdiction because she is not an employee with appeal rights to the Board. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

## BACKGROUND

¶2 Effective January 31, 2011, the appellant received a career-conditional appointment to the competitive service position of Contract Price/Cost Analyst.

Initial Appeal File (IAF), Tab 10, Subtab 4D. The legal authority for the appointment was a statutory direct-hire authority. *See id.*; *see also* 10 U.S.C. § 1705(g).[1] The agency indicated on the Standard Form (SF) 50 memorializing the appellant's hiring that her appointment was subject to the completion of a 1-year probationary period. IAF, Tab 10, Subtab 4D. The agency informed the appellant on January 24, 2012, that it was terminating her employment for unacceptable performance effective January 28, 2012. *Id.*, Subtab 4B.

¶3 The appellant filed an initial appeal challenging her termination and raising affirmative defenses of procedural error, discrimination, and whistleblower reprisal. IAF, Tab 1 at 5. The administrative judge issued an acknowledgment order apprising the appellant of her burden to establish that she had Board appeal rights under either 5 U.S.C. § 7511(a)(1)(A) or 5 C.F.R. § 315.806. IAF, Tab 2 at 2-4. The administrative judge issued a supplemental jurisdictional order informing the appellant of her burden to establish Board jurisdiction over an individual right of action (IRA) appeal. IAF, Tab 8.

¶4 After receiving evidence and argument from the parties, the administrative judge issued an initial decision dismissing the appellant's initial appeal for lack of jurisdiction. IAF, Tab 12, Initial Decision (ID). The administrative judge found that the statutory hiring authority pursuant to which the agency appointed the appellant qualified as a special appointing authority under 5 C.F.R. § 315.801(e), and that the appellant was therefore required to serve a 1-year probationary period. ID at 4. The administrative judge also rejected the appellant's argument that she had completed 1 year of federal service prior to the effective date of her termination, and found that the appellant did not allege that her termination was based on marital status discrimination or partisan political

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[1] The statute was amended on January 2, 2013, and the expedited hiring authority was moved from subsection (h) to subsection (g). *See* Pub. Law 112-239, 136 Stat. 1825. These changes do not affect the outcome of this appeal.

reasons. *Id*. at 4-5. The administrative judge further found that the Board lacked jurisdiction over the appellant's whistleblower reprisal claim as an IRA appeal because she failed to exhaust her administrative remedies with the Office of Special Counsel (OSC). *Id*. at 5. Finally, the administrative judge held that the Board could not consider the appellant's discrimination or procedural error claims in the absence of an otherwise appealable matter. *Id*. at 5-6.

¶5 The appellant has filed a timely petition for review in which she asserts that she was not required to complete a probationary period because she was not appointed by a special appointing authority or from a competitive list of eligibles. Petition for Review (PFR) File, Tab 1, Subtab 1 at 1-2. The agency argues in opposition to the petition for review that the administrative judge correctly dismissed the appeal for lack of jurisdiction. PFR File, Tab 3 at 5-6.

¶6 The Board issued a show cause order soliciting additional evidence from the parties concerning the manner in which the appellant was selected for her position. PFR File, Tab 6. In its response to the Board's show cause order, the agency asserts that the appellant's resume "was entered into [an agency] database on August 5, 2010, and her resume references an Open and Continuous Announcement for GS-1102-12 employees that was open from May 22 until June 22, 2009." PFR File, Tab 7 at 4. The agency offers no additional details on the appellant's selection for employment other than to assert that "it does not appear that she was hired under this Announcement." *Id*. at 5. In support of its argument that the appellant was required to serve a probationary period, the agency cites a fact sheet on the Office of Personnel Management's (OPM's) website, which states that employees hired pursuant to a direct-hire authority are required to serve a 1-year probationary period. *Id*. (citing https://www.opm.gov/policy-data-oversight/hiring-authorities-/direct-hire-authority/#url=Fact-Sheet/). The appellant has filed a response to the agency's submission in which she again asserts that that she was not appointed from a list of eligibles and that the hiring

authority used for her selection is not included in either 5 C.F.R. Subpart 315F or G, thus placing her outside of 5 C.F.R. § 315.801(e). PFR File, Tab 8 at 4.

## ANALYSIS

¶7 The definition of an employee with adverse action appeal rights to the Board under chapter 75 is found at 5 U.S.C. § 7511(a)(1). Under this section, an individual appointed to a competitive service position is an employee with appeal rights if she "is not serving a probationary or trial period under an initial appointment," or "has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." 5 U.S.C. § 7511(a)(1)(A)(i)-(ii); *Dooley v. Department of Veterans Affairs*, 112 M.S.P.R. 110, ¶ 6 (2009). In *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1342-43 (Fed. Cir. 2002), our reviewing court held that these definitions of employee are "alternative definitions," and that an individual who meets the definition of an employee under section 7511(a)(1)(A)(ii) need not also satisfy the definition of an employee in subsection (A)(i) in order to have appeal rights to the Board.

### The appellant was not required to serve a probationary period pursuant to 5 C.F.R. § 315.801.

¶8 The circumstances in which an employee must serve a probationary period are generally set forth in regulation at 5 C.F.R. § 315.801(a)-(e). Most commonly, an employee who is competitively hired from a list of eligible candidates pursuant to 5 C.F.R. § 315.301 is required to serve a 1-year probationary period. *See* 5 C.F.R. § 315.801(a)(1); *Abdullah v. Department of the Treasury*, 113 M.S.P.R. 99, ¶ 10 (2009).

¶9 The appellant alleged below that she was not selected from a list of eligible candidates, thus making 5 C.F.R. § 315.801(a)(1) inapplicable to her. *See* IAF, Tab 4. The administrative judge made no finding with regard to the appellant's status as an individual serving a probationary period pursuant to this section, *see*

ID at 4, and in response to the order to show cause, the agency has failed to present any evidence that the appellant was selected for her position from a list of eligible candidates under 5 C.F.R. § 315.301. *See* PFR File, Tab 7. Based upon this absence of evidence, we agree with the appellant that she was not required to a serve a probationary period pursuant to 5 C.F.R. § 315.801(a).

¶10 Under 5 C.F.R. § 315.801(e), "[a] person who is appointed to the competitive service either by special appointing authority or by conversion under subparts F or G of this part serves a 1-year probationary period unless specifically exempt from probation by the authority itself."[2] Subpart F of 5 C.F.R. Part 315 covers 12 categories of competitive service appointment made pursuant to several special hiring authorities specifically enumerated therein, *see* 5 C.F.R. §§ 315.601-315.612, and Subpart G covers an individual's conversion to a career or career-conditional position of employment from other types of employment, s*ee* 5 C.F.R. §§ 315.701-315.712.[3]

¶11 The administrative judge found that the hiring authority used for the appellant's appointment qualified as a special appointing authority, and that the appellant was therefore required to serve a 1-year probationary period under section 315.801(e). *See* ID at 4. We disagree. The Board has interpreted the language of section 315.801(e) to "refer[] only to authorities described in subparts 315F and 315G." *Tschumy v. Department of Defense*, 104 M.S.P.R. 488, ¶ 14 (2007). The statutory hiring authority relied upon by the agency for the appellant's appointment is not among the authorities listed in either Subpart 315F or G. Consistent with *Tschumy*, therefore, we find that the appellant was not required to serve a 1-year probationary period under 5 C.F.R. § 315.801(e). We

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[2] It is undisputed that the appointment at issue in this appeal is not covered by 5 C.F.R. § 315.801(b), (c), or (d).

[3] Neither party contends that this latter subpart is applicable in the instant appeal.

therefore MODIFY the initial decision with respect to whether the appellant was appointed by a special appointing authority.

Under the circumstances of this case, the agency was permitted to require that the appellant serve a period of probation.

¶12 The statutory hiring authority under which the appellant was appointed authorizes the agency to designate acquisition workforce positions for which there is either a shortage of candidates or a critical hiring need, and to "appoint qualified persons directly to positions so designated." 10 U.S.C. § 1705(g)(1)(A)-(B); *see* IAF, Tab 10, Subtab 4D. The hiring authority itself is silent as to whether appointees are required to serve a 1-year probationary period, *see* 10 U.S.C. § 1705(g), and OPM has not issued regulations addressing whether such appointees must serve a probationary period. *See* 5 C.F.R. §§ 337.201-337.206 (direct-hire regulations). Nevertheless, the agency issued an SF-50 stating that the appellant was required to serve a 1-year probationary period upon her initial appointment. *See* IAF, Tab 10, Subtab 4D.

¶13 We conclude that the absence of an affirmative statutory or regulatory provision requiring a career-conditional appointee to the competitive service to serve a probationary period does not preclude an agency from imposing a 1-year probationary period. In *Shelton v. Department of the Air Force*, 382 F.3d 1335, 1336-37 (Fed. Cir. 2004), the Federal Circuit addressed a similar scenario in which the agency required an employee to serve a probationary period under the "special circumstances" of the employee's reinstatement to employment with the agency. In *Shelton*, the agency reinstated the employee to her former position after a 13-year break in service and required her to serve a new 1-year probationary period despite her having previously served 7 years in her prior position. *Id.* at 1336. In so holding, the Federal Circuit rejected the appellant's claims that she had completed her probationary period during her previous period of employment and that the agency was without the authority to impose a second probationary period upon her reinstatement. *Id.* at 1337. "Imposition of a

reasonable condition to accommodate a special circumstance is not an illegal employment action. A new probationary period was not an unreasonable condition after thirteen years away from the job." *Id*.

¶14 Under the unique circumstances of this case, we find that the agency's requirement that the appellant serve a 1-year probationary period upon her initial appointment to federal service as a direct-hire appointee is a "reasonable condition" of employment. *See id*. First, the agency's requirement that the appellant serve a probationary period not only brings her in line with the overwhelming majority of first-time career-conditional competitive service selectees who are required to serve probationary periods under 5 C.F.R. § 315.801, but is also historically consistent with the nature of federal civil service appointments. *See Bander v. United States*, 158 F. Supp. 564, 566 (Ct. Cl. 1958) ("since the Civil Service Act of 1883 there has been a requirement for 'a period of probation before any absolute appointment or employment' in the civil service"). Service of either a probationary or trial period[4] upon initial appointment, moreover, is the preferred practice in federal employment because such a period allows "the Government . . . to evaluate an individual's conduct and performance on the job to determine if an appointment to the civil service should become final." *Sandoval v. Department of Agriculture*, 115 M.S.P.R. 71, ¶ 11 (2010). OPM's regulations, moreover, encourage agencies to use the probationary period "to determine the fitness of the employee and [] terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment." *Id*. (quoting 5 C.F.R. § 315.803(a)).

¶15 Second, we note that OPM's prior interpretive guidance concerning its regulations, the Federal Personnel Manual (FPM), explained that a direct-hire appointee was required to serve a 1-year probationary period upon appointment. *See* FPM, Chapter 315, Appendix A; *Poores v. Department of the Treasury*,

[4] A trial period is the first year of a term appointment. *See* 5 C.F.R. § 316.304(a).

47 M.S.P.R. 204, 208 (1991) ("appointments under an agency's direct-hire authority require a new probationary period."), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992) (Table). Although the FPM is now obsolete, the Board continues to look to it for persuasive guidance under narrow circumstances involving OPM's regulations. *See, e.g.*, *Special Counsel v. Malone*, 84 M.S.P.R. 342, ¶ 21 n.9 (1999); *Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 296 (1985) (noting "the Board may find FPM material instructive"). We find the FPM's discussion of direct-hire appointees to be instructive in this case, especially given its alignment with the general practice that almost all first-time competitive service employees are subject to a 1-year probationary or trial period before acquiring adverse action appeal rights to the Board. *Cf. Johnson v. Department of Veterans Affairs*, 99 M.S.P.R. 362, ¶¶ 7-10 (holding that to interpret 5 U.S.C. § 7511 as allowing a temporary employee to acquire immediate adverse action appeal rights upon appointment would lead to an "unreasonable result"), *review dismissed*, 161 F. App'x 945 (Fed. Cir. 2005). We have found nothing to support the view that a direct-hire career-conditional appointee should acquire immediate adverse action appeal rights to the Board.[5]

¶16 Lastly, we note that an agency's ability to delay an appointee's acquisition of adverse action Board appeal rights by imposing a probationary period is limited by 5 U.S.C. § 7511(a)(1)(A)(ii) and 5 C.F.R. § 752.401(c). Once a competitive service employee completes 1 year of current continuous service under other than a temporary appointment limited to 1 year or less, that

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[5] We further note that while OPM's regulations do not explicitly address whether a direct-hire career-conditional employee must serve a probationary period, those regulations expressly provide that a direct-hire term employee must serve a trial period, thus placing such an employee outside of section 7511(a)(1)(A)(i) during his first year of employment. *See* 5 C.F.R. § 316.302(a) ("An agency may make a term appointment . . . under part 337 of this chapter[] by using direct-hire procedures"); 5 C.F.R. § 316.304(a) ("The first year of service of a term employee is a trial period regardless of the method of appointment.").

individual is an employee with appeal rights to the Board under chapter 75. *See Walker v. Department of the Army*, 119 M.S.P.R. 391, ¶ 7 n.3 (2013) ("the appellant is an employee with chapter 75 appeal rights if she satisfies *either one or both*" of the § 7511(a)(1)(A) criteria) (emphasis added); *Smart v. Department of Justice*, 116 M.S.P.R. 582, ¶ 10 n.2 (2011) ("Prior to *McCormick*, subsections (A)(i) and (A)(ii) [of § 7511(a)(1)(A)] had been interpreted to be mutually exclusive methods for individuals in the competitive service to meet the definition of being an 'employee' with Board appeal rights.").

¶17 Under the circumstances of this case, we find that the agency had the authority to require the appellant to serve a 1-year probationary period upon her direct-hire appointment to a career-conditional competitive service position. The SF-50 memorializing the appellant's appointment confirms that the agency imposed that requirement at the time of appointment. IAF, Tab 10, Subtab 4D.[6] Accordingly, because the appellant was serving a probationary period at the time of her termination from employment, we find that she does not qualify as an employee under § 7511(a)(1)(A)(i) with adverse action appeal rights to the Board.

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[6] The appellant asserts on petition for review that she did not receive a copy of the SF-50 reflecting the requirement that she complete a probationary period at the time of her appointment. *See* PFR File, Tab 8 at 6. Even if true, this does not change our analysis. We have previously held that the failure to inform an individual of her probationary status, without more, does not confer employee status on the individual. *See Phillips v. Department of Housing & Urban Development*, 44 M.S.P.R. 48, 52 (1990). Additionally, we note this case is distinguishable from the line of Board authority addressing whether an employee's waiver of Board appeal rights and agreement to serve an additional probationary period is knowing, willing, and voluntary. *See, e.g.*, *Chavies v. Department of the Navy*, 104 M.S.P.R. 81, ¶ 11 (2006). Unlike those cases, which address whether the individuals knowingly and willingly relinquished their status as "employees" under section 7511(a)(1)(A)(ii), in the instant case, the appellant does not qualify as an employee under section 7511 based upon her length of service. *See infra*. Accordingly, because the appellant did not relinquish a preexisting statutory right upon accepting the agency's offer of employment subject to a 1-year probationary period, we need not address whether the appellant made a knowing, willing, and voluntary waiver of her rights upon her acceptance of the agency's offer of employment.

The appellant does not meet the length of service requirement under 5 U.S.C. § 7511(a)(1)(A)(ii) to have adverse action appeal rights to the Board.

¶18 The administrative judge also concluded that the appellant does not have appeal rights to the Board under 5 U.S.C. § 7511(a)(1)(A)(ii) because she had not completed 1 year of current continuous service at the time of her termination, and she did not present any evidence of prior federal employment that could be used to add to her current period of employment. *See* ID at 4. We agree with the administrative judge's findings.

¶19 Although the appellant argued below that she had completed 1 year of service as of the effective date of her termination on January 28, 2012, *see* IAF, Tab 11 at 2, the appellant based her calculation upon the approval date for her appointment as reflected on her SF-50, January 27, 2011, rather than her effective start date, January 31, 2011, *id.*; *see also* IAF, Tab 10, Subtab 4D. In interpreting 5 U.S.C. § 7511(a)(1)(B), the Board has held that an appellant completed 1 year of current continuous service, thus satisfying the requirement for Board appeal rights, when she was separated after more than a year from the date on which she entered her position. *Gadsden v. Department of State*, 102 M.S.P.R. 79, ¶ 13 (2006). The language requiring completion of 1 year of current continuous service is similar in 5 U.S.C. § 7511(a)(1)(A)(ii). Thus, because the appellant entered on duty on January 31, 2011, that is when her first year of service began. *See* IAF, Tab 10, Subtab D. Accordingly, her first year of current continuous service would have concluded upon the end of her tour of duty on January 30, 2012. *See Jackson v. U.S. Postal Service*, 73 M.S.P.R. 512, 514 n.2 (1997) (interpreting 5 U.S.C. § 7511(a)(1)(B), the Board concluded that an appellant appointed to her position on October 16, 1993, completed 1 year of current continuous service on October 15, 1994), *rev'd in part on other grounds on reopening*, 79 M.S.P.R. 46 (1998). The appellant's removal was effective as of January 28, 2012. IAF, Tab 10, Subtab 4A. The administrative judge, therefore, properly held that the appellant did not have 1 year of current continuous service

as of the effective date of her termination in order to qualify as an employee under section 7511(a)(1)(A)(ii).

The appellant has failed to allege any other basis for Board jurisdiction over her appeal.

¶20 Lastly, we find that the administrative judge correctly found that the appellant did not allege that her termination was based on partisan political reasons or marital status under 5 C.F.R. § 315.806(b), *see* ID at 5, and the appellant does not challenge this ruling on review. The administrative judge properly declined to consider the balance of the appellant's affirmative defenses in the absence of jurisdiction. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

¶21 The administrative judge also properly ruled that the appellant failed to exhaust her administrative remedies with OSC prior to asserting a whistleblower reprisal claim before the Board. *See* ID at 5. An employee seeking corrective action for whistleblower reprisal under 5 U.S.C. § 1221 is required to seek corrective action from OSC before seeking corrective action from the Board. *Cassidy v. Department of Justice*, 118 M.S.P.R. 74, ¶ 5 (2012). The appellant has submitted no evidence demonstrating that she presented her whistleblower reprisal claim to OSC, and therefore the administrative judge properly found that the appellant's whistleblower reprisal claim did not provide a basis for Board jurisdiction over her appeal. *See Tullis v. Department of the Navy*, 117 M.S.P.R. 236, ¶ 6 (2012).

## CONCLUSION

¶22 The administrative judge's initial decision dismissing the appellant's appeal for lack of jurisdiction is AFFIRMED AS MODIFIED by this Opinion and Order. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal

Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.